No. 46896-4-II

Court of Appeals, Div. II, of the State of Washington

Gary Norman Sea and **Marilyn Louise Sea,** a marital community,

Appellants,

v.

Patricia Swanson aka Trisha M. Swanson, a single woman,

Respondent.

Brief of Respondent

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1. Introduction

This case presents an opportunity for this Court to assess the proper scope of the application of Washington's anti-SLAPP statutes and to hold them to the purpose for which they were originally enacted. The trial court was correct in recognizing that Swanson's counterclaims were not asserted as a Strategic Lawsuit Against Public Participation (SLAPP). The anti-SLAPP statutes should not apply.

This is a private dispute between neighbors that has gotten out of hand. Seas dislike Swanson because she owned a Rottweiler and because she refused to change landscaping that had been in place since 2002. Starting in 2011, Seas made continually escalating demands related to the dog and the landscaping.

Since then, Seas have enlisted the aid of no fewer than ten attorneys and various state and local government agencies as weapons of intimidation in hopes of imposing their will on Swanson. Swanson responded to the complaints and government investigations and attempted to defend herself. She did not retaliate against Seas or attempt to silence them. After the Seas' attempts to use the government failed to convince Swanson to capitulate to their demands, Seas filed the present lawsuit. Only then did Swanson assert counterclaims arising from the Seas' abusive behavior, including their improper use of the government as a weapon in their personal crusade against Swanson. The counterclaims are not a SLAPP. The trial court was correct to deny the Seas' anti-SLAPP motion.

2. Counter-Statement of Issues

Seas incorrectly seek to expand the errors and issues for this Court's review beyond the trial court's decision on the anti-SLAPP motion. Seas' appeal is before this Court pursuant to RCW 4.24.525, which provides "a right of expedited appeal from a trial court order on the special motion." RCW 4.24.525(5)(d). The statute does not change the parties' rights to appeal from any other decision of the trial court. Seas' assignments of error 3 and 4 and issues 3, 4, and 5 are unrelated to the trial court's decision on the anti-SLAPP special motion. Therefore, those issues are not ripe for review. This Court should decline to address Seas' arguments related to those issues.

The issues that are properly before the Court in this case can be stated as follows:

Whether the trial court was correct to deny Seas' anti-SLAPP motion where Swanson's counterclaims are not based on constitutionally protected speech or petitioning activities and do not implicate the legislative purposes of the anti-SLAPP statutes.

Whether this Court should deny Seas' request for attorney fees on appeal where an award of fees would exact an unjust penalty on Swanson.

3. Statement of the Case

Swanson disagrees with Seas' statement of facts in this case. Because this is an appeal of an anti-SLAPP special motion to strike, there has been no discovery in this case. The underlying facts remain hotly disputed. Swanson presents the facts in a light most favorable to her, as is proper under the

summary judgment-like standard the Court applies in ruling on anti-SLAPP motions. *See Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 90, 316 P.3d 1119 (2014) (applying the summary judgment-like standard to both steps of the RCW 4.24.525 analysis).

3.1 History of Swanson's landscaping

Patricia Swanson's mother purchased the home at 1138 Arcadia Street NW from the developer in 2001. CP 253-54. The neighboring lot to the north would later be purchased by the Seas in 2005. CP 61, 254. When Swanson's mother purchased the property, a large portion of the backyard was bare of all vegetation. CP 254. In 2002, Swanson's mother had some landscaping work done in the backyard, including planting trees and shrubs and installing garden boxes and a walkway with stairs. CP 254-55. None of the neighbors ever complained about the work Swanson's mother had done in the backyard. CP 256.

Swanson's mother passed away in 2006, and Swanson inherited the property in 2007. CP 258. After taking title, Swanson had some additional work done on the house. CP 257-59. Swanson had new flooring installed in the house, CP 257, and expanded her back patio by installing patio pavers to the right and left of the original concrete pad, CP 258-59. Mr. Sea testified that he saw "bobcat-type earthmoving equipment" in Swanson's backyard during this time period, CP 64, but Swanson has maintained that no grading has occurred on the property since 2002, *see* CP 164, 293. Seas made no complaints at the time. *See* CP 65.

Mrs. Sea directly observed the condition of the landscaping when she came over for a visit in 2007. CP 257. Swanson's backyard was readily visible over the fence from Seas' backyard. CP 245, 256. Any excess runoff onto Seas' property should have been visible on Seas' side of the fence, but Mr. Sea never testified that he observed water entering his property. *E.g.,* CP 62 ("We *now* know that since at least 2007, excess water has flowed…" (emphasis added)). Seas did not complain about the landscaping or any excess water until 2011 or 2012. *See* CP 65, 245.

3.2 Seas' crusade against Swanson's Rottweiler

In the summer of 2006, Swanson purchased two puppies: a Pomeranian and a Rottweiler named Heidi. CP 298. Mrs. Sea noticed the puppies while Swanson was playing with them in the backyard. *Id.* She looked over the fence and asked about them. *Id.* When Swanson told Mrs. Sea that Heidi was a Rottweiler, Mrs. Sea said that Rottweilers were horrible, vicious dogs and that Mr. Sea had been attacked on three previous occasions. *Id.* Consistent with this bias and fear of Rottweilers, Mr. Sea testified that he "felt threatened and terrified" by Heidi. CP 68. Yet, aside from the Seas, there were no other complaints about Swanson's dogs. CP 308. To the contrary, all of Swanson's guests, including Homeowners Association board members, liked Heidi and were comfortable in her presence. CP 298.

Heidi attended and graduated from obedience school. CP 298. When Swanson was not home, the dogs were restricted to the house. *Id.* Swanson would return home once or twice a day to let the dogs out for some fresh air.

Id. In March 2007, the Seas began complaining to Swanson about her dogs' barking. CP 189. Seas continued to complain over the next three years but were not satisfied that Swanson was addressing the situation. CP 68. In late 2011, Seas hired an animal law attorney, who penned intimidating letters to Swanson, the Homeowners' Association, and Thurston County Animal Services, demanding restraints and restrictions on Heidi. CP 69, 194, 199-206. The Homeowners' Association investigated and determined the complaints were unfounded. CP 308.

On June 3 and 4, 2011, Swanson was managing her parents' estate sale and knew she could not return to the house to let her dogs out. CP 298. She left the back door open so the dogs could get out into the fenced backyard as needed. CP 298-99. On June 4, a friend discovered Heidi cowering in fear in a back room of Swanson's house. CP 299. Shortly thereafter, Heidi was diagnosed with Addison's disease. *Id.* Swanson had Heidi euthanized on December 27, 2011, due to quality of life concerns related to the disease. CP 299, 309.

3.3 Dispute over the common boundary fence

Also in 2011, Swanson proposed to the Seas that they all rebuild the common boundary fence, which, having been built in the middle of a drainage swale, was predictably rotting out. *See* CP 68 ("In July 2011, Swanson informed us that the fence was structurally compromised"). Seas resisted and objected to any proposals Swanson made for replacing the fence. *See* CP 215.

Seas blamed Swanson for the impaired condition of the fence. *See* CP 204. They demanded that Swanson remove elements of her landscaping that had been in place since 2002 before they would cooperate in rebuilding the fence. *See* CP 243-45. Seas threatened to initiate arbitration. *See* CP 245. The fence fell in March 2012. CP 301. Seas repeated their demands regarding Swanson's landscaping. CP 65. Swanson's engineers determined that the actual cause of the failure was natural, aging decay of the posts combined with a heavy wind event on March 12. CP 164.

Seas placed "no trespassing" signs at the fence line to prevent Swanson from working on the fence. *See* CP 69-70, 215-16. After more than a year of failed negotiations, Swanson decided to rebuild the fence on her own property at her own expense. CP 301. When Swanson's contractor arrived in June 2013, Seas demanded that he follow their instructions regarding Swanson's landscaping. CP 70-71, 301. Seas watched the construction carefully and complained about every small detail. *See* CP 164. Seas harassed the contractor, who, unfortunately, became enraged by their interference. *See* CP 71-72, 301. Seas retaliated by reporting the contractor's failure to register, resulting in a $1,000 fine for an oversight the contractor corrected the next day. CP 72, 301.

3.4 Seas' complaint to Thurston County

Before Swanson rebuilt the fence, Seas had numerous conversations with Thurston County officials regarding Swanson's landscaping, trying to find violations of the County Code to use against her. *See* CP 64. Seas filed a

formal complaint in April 2013. CP 66. The complaint alleged that Swanson elevated her grade level and filled the drainage swale on her side of the fence in 2007, without a permit, resulting in excess drainage infiltrating the Seas' crawlspace. CP 84. However, Swanson's 2007 landscaping project did not involve any fill or grading. *See* CP 258-59. Her mother's landscaping project in 2002 did not require any permits. CP 254.

The Seas' complaint led to a compliance letter and a notice of infraction for alleged violation of the county grading ordinance. CP 66, 151-52, 154-56. Swanson denied the allegations and sought dismissal of the infraction. CP 158-73. The County, recognizing Swanson was likely to prevail, voluntarily dismissed the infraction on the eve of trial and has not re-filed. *See* CP 185-87, 295.

3.5 The present lawsuit

Realizing their attempt to use the County against Swanson had failed, the Seas filed the present lawsuit in March 2014. CP 7. The Seas sought damages and injunctive relief for the alleged excess runoff and failure of the fence. CP 17-27. Swanson answered, denying the allegations and raising a number of defenses and counterclaims. CP 29-33. Swanson's counterclaims included harassment; violation of Washington's Privacy Act and intrusion on seclusion; filing of false reports; tortious interference with contract; and nuisance. CP 31-32.

Seas filed a motion to dismiss Swanson's counterclaims, arguing that dismissal was warranted under RCW 4.24.525 and RCW 4.24.510 and for

failure to state a claim on which relief could be granted. CP 38-39. Seas also requested CR 11 sanctions. CP 39. The motion was supported by a lengthy declaration of Mr. Sea. CP 61-252. Swanson argued in response that the anti-SLAPP statutes did not apply and that her counterclaims had merit. CP 314-31.

The trial court denied the anti-SLAPP motion under the first prong of the analysis—whether the counterclaims were based on an action involving public participation or petition. RP, Sept. 19, 2014,[1] at 30-32. The trial court held that the anti-SLAPP statutes clearly did not apply to Swanson's privacy, nuisance, and tortious interference claims. RP at 31:23-32:5. While noting that the other two claims were a closer call, the trial court held that it would not be appropriate to dismiss them under the anti-SLAPP statutes. RP at 31:18-20, 32:5-9.

The trial court then analyzed each of the counterclaims separately for dismissal under CR 12(b)(6), applying a summary judgment standard based on the declarations that had been filed. RP at 32-35. The trial court dismissed all of the counterclaims except for the two nuisance claims. *Id.* The trial court also denied the request for CR 11 sanctions. RP at 36.

Seas appealed the denial of their anti-SLAPP motion pursuant to RCW 4.24.525(5)(d). CP 417.

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[1] Unless otherwise noted, all citations to RP refer to the Sept. 19, 2014 hearing.

4. Summary of Argument

Seas incorrectly seek to expand the issues on review beyond what is properly before the Court. The right of expedited appeal of a decision on an anti-SLAPP special motion to strike extends only to the decision on the motion itself. This Court should decline to address any other issues.

The trial court was correct to deny Seas' special motion to strike. Swanson's counterclaims do not implicate the legislative purposes of the anti-SLAPP statutes. The content, context, and intent of Seas' communications to government demonstrate that they were not acting as concerned citizens apprising government of a public wrong; rather, they were seeking to enlist the government as a weapon in their private battle with Swanson. This case is outside the scope of the legislative purpose of the anti-SLAPP statutes.

The first prong of the statutory analysis supports this conclusion. None of Swanson's counterclaims are targeted at constitutionally protected speech or petition activity. Seas' false reports to government are not constitutionally protected and are therefore not protected by the anti-SLAPP statutes. The trial court was correct to deny the anti-SLAPP motion.

Even if the Seas' false reports fall under the protection of RCW 4.24.525, this Court should affirm because the factual allegations in Swanson's counterclaims support a claim for malicious prosecution on which Swanson has a likelihood of prevailing on the merits. Immunity under RCW 4.24.510 does not apply.

5. Argument

5.1 This Court should decline to address any issues not directly related to the trial court's decision on the anti-SLAPP special motion to strike.

Seas incorrectly seek to expand the issues beyond what is properly before the Court. The anti-SLAPP statutes provide "a right of expedited appeal from a trial court order on the special motion." RCW 4.24.525(5)(d). The statute does not change the parties' rights to appeal from any other decision of the trial court.

Generally, an appeal by right only arises from a final judgment. Under CR 54, final judgment is "the final determination of the rights of the parties in the action," and any other decision of the trial court that adjudicates fewer than all of the claims is an "order" that does not terminate the action as to any of the claims. CR 54(a)-(b). Such an order is interlocutory and cannot be appealed as a matter of right. RAP 2.2; RAP 2.3.

Seas joined other motions with their special motion to strike under the anti-SLAPP statute, but this joinder should not give them any special appeal rights as to those other motions. Indeed, the automatic stay imposed by RCW 4.24.525 on all other motions demonstrates the legislature's intent that anti-SLAPP motions should be determined—and qualified for review—separately from any other motions. *See* RCW 4.24.525(5)(c). Expedited appeal by right under RCW 4.24.525(5)(d) applies only to the anti-SLAPP motion itself.

Seas appealed the trial court's decision on the anti-SLAPP motion as a matter of right. CP 417 (Seas' notice of appeal sought review, "Pursuant to RCW 4.24.525(5)(d)," of the "order denying their anti-SLAPP motion."). Seas did not designate the trial court's decisions on any of their other motions in their notice of appeal or in a notice or motion for discretionary review. *See Id.* Any issues related to those other motions are beyond the scope of this Court's review. *See* RAP 2.4.

Seas assign error to the superior court's denial of their motion to dismiss. Appellants' Opening Brief at 3-4 (assignment of error 3 and issue 4). This decision was not a final judgment; it did not adjudicate Swanson's nuisance claims. *See* CR 54. Denial of a motion to dismiss does not give rise to an appeal by right. *See* RAP 2.2. The decision was not a part of the trial court's decision on the anti-SLAPP special motion to strike. *Compare* RP at 31-32 (anti-SLAPP decision) with RP at 32-35 (decision on dismissal under CR 12(b)(6)/CR 56). Seas did not request discretionary review of the trial court's decision on their motion to dismiss. *See* CP 417. This Court should decline to review Seas' assignment of error 3 and issue 4.

Seas assign error to the superior court's denial of their motion for sanctions under CR 11. Appellant's Opening Brief at 3-4 (assignment of error 4 and issue 5). This decision was not a final judgment; it did not adjudicate any claims. *See* CR 54. The denial of sanctions under CR 11 does not give rise to an appeal by right. *See* RAP 2.2. The decision was not a part of the trial court's decision on the anti-SLAPP special motion to strike. *Compare* RP at 31-32 (anti-SLAPP decision) with RP at 36 (decision denying

CR 11 sanctions). Seas did not request discretionary review of the trial court's denial of sanctions. *See* CP 417. This Court should decline to review Seas' assignment of error 4 and issue 5.[2]

Seas raise as an issue, without identifying an assigned error, whether the trial court could avoid the anti-SLAPP decision by granting a motion to dismiss under CR 12(b)(6) or CR 56. Appellants' Opening Brief at 3 (issue 3). This issue bears no relation to the decision the trial court actually made. The trial court *first* addressed the anti-SLAPP analysis prescribed by RCW 4.24.525, found that the anti-SLAPP statutes did not apply, and denied the special motion to strike. RP at 31-32. Only *after* denying the anti-SLAPP motion did the trial court grant in part and deny in part Seas' motion to dismiss under CR 12(b)(6)/CR 56. RP at 32-35. The trial court did not *avoid* the anti-SLAPP decision; the trial court *denied* the motion on its merits. Because it bears no relation to the trial court's decision, this Court should decline to review Seas' issue 3.

5.2 A decision on an anti-SLAPP special motion to strike is reviewed *de novo.*

This Court reviews the denial of an anti-SLAPP motion *de novo. Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 70, 316 P.3d 1119 (2014). Issues of statutory interpretation are also reviewed *de novo. Id.* In

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[2] Seas raise RCW 4.84.185 for the first time on appeal. Their motion in the trial court only addressed CR 11, in a single sentence, without any substantive support by way of authority or argument. CP 39. Seas' failure to argue these sanctions to the trial court is a second, alternate reason to decline review. *See* RAP 2.5(a); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001).

deciding an anti-SLAPP special motion to strike, the courts apply a summary judgment-like standard. *Id.* at 89-90. The court may not find facts; instead it must view all facts and reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 90.

5.3 The trial court was correct in denying Seas' anti-SLAPP motion where Swanson's counterclaims are not based on constitutionally protected speech or petitioning activities and do not implicate the legislative purposes of the anti-SLAPP statutes.

A SLAPP suit is designed to discourage a speaker from voicing his or her opinion. *Henne v. City of Yakima*, ___ Wn.2d ___, No. 89674-7, slip op. at 2, 341 P.3d 284, 286 (2015). The legislature has expressed concern over SLAPP suits that seek to intimidate the exercise of speech and petition rights "on a substantive issue of some public interest or social significance." Laws of 2002, ch. 232 § 1; Laws of 2010, ch. 118 § 1. The legislature has found, "It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process." Laws of 2010, ch. 118 § 1.

In order to prevent such abuse and avoid any chill of First Amendment rights of speech and petition, the legislature enacted and amended the anti-SLAPP statutes codified at RCW 4.24.500 et seq. Most recently, the legislature enacted RCW 4.24.525, which provides a procedural mechanism for speedy adjudication and dismissal of SLAPP suits. The stated purpose of the act was to "[s]trike a balance between the rights of persons to

file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern." Laws of 2010, ch. 118 § 1.

Under RCW 4.24.525, "a party may bring a special motion to strike any claim that is based on an action involving public participation and petition." RCW 4.24.525(4)(a). Filing of the special motion creates an automatic stay on discovery and all other motions until the court enters an order ruling on the motion. RCW 4.24.525(5)(c).

The moving party bears the initial burden of demonstrating that the challenged claim is based on an action involving public participation and petition. RCW 4.24.525(4)(b). In making this determination, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Dillon*, 179 Wn. App. at 90. If the moving party fails to meet this burden, the anti-SLAPP statute does not apply and the motion must be denied. *Alaska Structures v. Hedlund*, 180 Wn. App. 591, 598, 323 P.3d 1082 (2014).

If the moving party meets its burden, the responding party then bears the burden of demonstrating a probability of prevailing on the claim. RCW 4.24.525(4)(b). Again, the court must view the evidence and all reasonable inferences in the light most favorable to the responding party—even though the burden of proof shifts, the favorable light does not. *Dillon*, 179 Wn. App. at 90. The immunity provided by RCW 4.24.510 enters into the special motion analysis, if at all, in this stage. *Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 942-43 (9th Cir. 2013). If the responding party meets its burden, the motion must be denied. RCW 4.24.525(4)(b).

As will be demonstrated below, the trial court was correct in denying Seas' special motion to strike. Swanson's counterclaims were not asserted as a Strategic Lawsuit Against Public Participation and do not fall within the range of abusive suits the legislature sought to prevent. Seas cannot meet their burden of showing that Swanson's counterclaims are targeted at constitutionally protected activity. Even if Seas' false statements are protected, the evidence demonstrates Swanson's probability of prevailing on claims arising from those false statements. Seas cannot claim immunity under RCW 4.24.510 because its protection does not extend to unlawful false claims.

5.3.1 Swanson's counterclaims do not implicate the legislative purpose of the anti-SLAPP statutes to prevent abusive lawsuits that chill constitutionally protected speech on matters of public concern.

This lawsuit, and Swanson's counterclaims, do not fit within the scope of the problem the legislature sought to remedy through the anti-SLAPP statutes. The statutes are targeted at *strategic* (the "S" in SLAPP) lawsuits that abuse the judicial process for the purpose of chilling constitutionally protected speech and petitioning activity on public issues. The legislative findings and statements of policy and purpose that accompany the anti-SLAPP statutes focus on these characteristics—(1) abusive lawsuits (2) intended to chill protected speech (3) on matters of public concern.

> It is in the public interest for citizens to participate in **matters of public concern** and provide information to

> public entities and other citizens **on public issues** that affect them without fear of reprisal through **abuse** of the judicial process.

Laws of 2010, ch. 118 § 1 (emphasis added). The legislature sought to strike a balance between the rights of plaintiffs and "the rights of persons to participate in **matters of public concern."** *Id.* (emphasis added). "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants **in public controversies** from an **abusive use of the courts."**[3] *Id.* at § 3 (emphasis added).

Washington courts have recognized this legislative purpose and have attempted to strike the balance the legislature sought. *E.g., Henne*, 341 P.3d at 288, slip op. at 9 ("the legislature made clear" that the purpose was to prevent frivolous suits from deterring exercise of constitutional rights); *Alaska Structures*, 180 Wn. App. at 603 ("We must adhere to the legislature's policy … to strike a balance…").

> This declaration of purpose evidences the legislative goals of balancing the rights of both plaintiffs and defendants, yet allowing expedited judicial review and dismissal of those defamation claims brought abusively for the primary purpose of chilling protected public speech.

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[3] Seas argue for expansive application of the anti-SLAPP statutes based on the legislative direction to construe liberally, but they ignore the qualifying mandate, "to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Laws of 2010, ch. 118 § 3. Our Supreme Court has noted that this legislative mandate is narrower than the California mandate to "construe[] broadly." *Henne*, 341 P.3d at 289; slip op. at 12-13. The mandate to construe RCW 4.24.525 liberally is restrained by the general purposes of the act.

Johnson v. Ryan, ___ Wn. App. ___, No. 31837-1-III, 2015 Wn. App. LEXIS 564, 10 (March 19, 2015).

The legislature was not concerned about plaintiffs who had viable claims for false statements under existing law; its concern was with lawsuits that are "brought primarily to chill the valid exercise of … constitutional rights." *Johnson*, at 34 (Siddoway, C.J., concurring). Rather, the legislature was concerned about citizens who would "fear … reprisal through abuse of the judicial process," while "[s]trik[ing] a balance" that recognizes "the rights of persons to file lawsuits and to trial by jury." *Id.* at 34-35 (Siddoway, C.J., concurring).

Swanson's counterclaims do not implicate these legislative purposes. Swanson's counterclaims allege a pattern of harassment against Swanson; intrusion on Swanson's privacy through installation of a surveillance system recording video and audio of Swanson's backyard and house; filing of false reports with Thurston County and other regulatory organizations; interference with contract; disturbance of drainage capabilities at the property boundary; and damage to the market value of Swanson's home. CP 31-32.

Swanson did not bring her counterclaims in an attempt to silence Seas. CP 302. To the contrary, Swanson allowed the investigations that resulted from Seas' false statements to government agencies to run their course. She responded and defended herself in due course, but never retaliated. *E.g.*, CP 158-73. Only after Seas escalated the conflict to full-blown litigation did Swanson raise her counterclaims, to ensure that all of the

facts of the matter came to light and to obtain redress for the harms she suffered at Seas' hands.

Moreover, Swanson's counterclaims do not implicate any constitutionally protected speech or petition on a matter of public concern. In determining whether speech or conduct is of public concern, Washington courts should focus on Washington and federal precedent. *Johnson*, at 14. In looking to such authorities, the *Johnson* court noted some instructive decisional rules. For example, a matter that is of concern only to the speaker and a relatively small, specific audience is not a matter of public concern. *Id.* at 15. Also, the focus of the speaker's conduct should be the public interest rather than an effort to gather ammunition for a private controversy. *Id.*

Washington courts have also looked to California precedent, where matters of "public interest" include communications about (1) a person "in the public eye;" (2) conduct that could affect a large number of people beyond the direct participants; and (3) a topic of widespread, public interest. *Alaska Structures*, 180 Wn. App. at 599-600 (quoting *Cross v. Cooper*, 197 Cal. App. 4th 357, 373, 127 Cal. Rptr. 3d 903 (2011)).

The *Johnson* court ultimately determined that the courts must examine the content, form, and context of the speech in light of the entire record, including the speaker's intent—*e.g.*, was the speaker acting as an aggrieved party seeking to rectify a private wrong, or was he or she acting as a concerned citizen bringing a wrong to light? *Johnson*, at 21-22. By examining the content, form, context, and intent, "we better achieve the legislative purpose of balancing the rights of both litigants" so that the process weeds

out only those claims brought for the abusive purpose of chilling valid public speech. *Johnson* at 22.

The Seas' statements at issue in Swanson's counterclaims do not meet this test of public concern. The statements to Thurston County involved allegations of unpermitted grading on the Swanson property causing excess runoff onto the Sea property. CP 80-149. Swanson is not a person in the public eye. The alleged grading and any remedy would only affect Swanson and Seas. Swanson's landscaping was not a topic of widespread, public interest.

The content of the communications is interesting. Rather than simply reporting the alleged grading activity and asking the County to investigate, Seas provide a detailed analysis of every detail of Swanson's landscaping with which they are displeased, complete with ordinance citations and the legal conclusions they want the County to reach. *See* CP 80-149. This kitchen-sink approach belies any argument that Seas were communicating as concerned citizens rather than seeking redress of a private wrong.

The context of the communications is particularly enlightening in this regard. The private dispute between Seas and Swanson has been going on since at least 2007, starting with complaints about Swanson's dogs. Despite the fact that Mr. Sea claims to have seen a bobcat doing grading work in Swanson's yard in 2007, Seas did not notify the County until 2013, after the conflict over the dog had escalated to enlisting attorneys, the Homeowners Association, and Animal Control; and after the boundary fence fell, leading to more attorney involvement, failed negotiations, threats,

demands, and Swanson's decision to construct her own fence on her own side of the boundary.

If Seas' intent had been to act as concerned citizens bringing Swanson's alleged grading violation to light, they would have done so in 2007. Even if Seas' intent had been to seek redress from government to prevent damage to their home from Swanson's alleged grading, they would have done so in 2007.

This case is nothing more than a private dispute between neighbors that has gotten out of control. The trial court astutely observed:

> [I]t is clear to me from reading these pleadings that both the Seas and Ms. Swanson see themselves completely as the victim in their circumstance and that neither of them have ever engaged in any activity that could possibly have upset the other party. And what this court knows from experience is, that can't be true, and unfortunately, once these things start going, they just snowball, and people behave in ways that they don't behave in the other parts of their lives.

RP, Sept. 19, 2014, at 28:25-29:9. The dispute between these neighbors snowballed to the point where the Seas felt it appropriate to enlist the government as a weapon in their private dispute against Swanson. The purpose of Seas' communications to government over the course of this dispute was not to address issues of public concern, but to serve as ammunition in their private battle with Swanson.

In deciding whether the anti-SLAPP statutes apply, courts "must adhere to the legislature's policy that the purpose of the anti-SLAPP statute is to strike a balance between the right of the person to file a lawsuit and that

person's right to a jury trial and the rights of people to participate in 'matters of public concern.'" *Alaska Structures*, 180 Wn. App. at 603. The trial court properly struck that balance when it determined that the anti-SLAPP statutes do not apply to Swanson's counterclaims. Swanson's counterclaims are not an abusive SLAPP suit. Seas' communications to government were not protected petitioning on a matter of public concern. Swanson's counterclaims are outside of the legislative purposes of the anti-SLAPP statutes. This Court should affirm the trial court's denial of the special motion to strike.

5.3.2 RCW 4.24.525 does not apply because the gravamen of Swanson's counterclaims is to obtain relief from unprotected false statements made by Seas.

The analysis prescribed in RCW 4.24.525 also requires this Court to affirm. The first prong of the analysis is to determine whether any of Swanson's counterclaims are based on constitutionally protected activity. RCW 4.24.525(4)(b); *Alaska Structures*, 180 Wn. App. at 597. First, the activity must fit within one of the statutorily defined categories of actions "involving public participation and petition":

> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

> (c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
> (d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or
> (e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

RCW 4.24.525(2). In determining whether a claim meets the statutory definition, the court looks at the "principal thrust or gravamen" of the claim. *Dillon*, 179 Wn. App. at 72.

As the trial court correctly determined, Swanson's counterclaims of invasion of privacy, nuisance, and tortious interference do not even arguably fit within any of these categories. *See* RP at 31:23-32:5. The invasion of privacy claim is based on the installation of surveillance cameras. Like transcribing a phone conversation, surveillance is not an act of speech or petition. *See Dillon*, 179 Wn. App. at 72. The trial court was correct to deny the special motion to strike the invasion of privacy counterclaim.

The tortious interference claim is based on conversations between Ms. Sea and a Mr. Morgan, who owed Swanson money. *See* CP 300, 325. These conversations did not relate in any way to any government proceeding (subsections (a), (b), and (c)). They did not take place in a public forum and were not related to an issue of public concern (subsection (d)). They were

not in furtherance of free speech or petition on a matter of public concern (subsection (e)).[4] The trial court was correct to deny the special motion to strike the tortious interference counterclaim.

The nuisance claim is based on acts of the Seas that harmed Swanson's quiet enjoyment of her property, including constant surveillance of the property; disturbance of drainage capabilities at the property boundary; personal harassment of Swanson, her dogs, and workers hired by Swanson; and impairing the marketability of the property. CP 31-32, 324. None of these acts related to any government proceeding or any issue of public concern. The trial court was correct to deny the special motion to strike the nuisance counterclaims.

While noting that the other two claims were a closer call, the trial court correctly held that it would not be appropriate to dismiss them under the anti-SLAPP statutes. RP at 31:18-20, 32:5-9. The false report/abuse of process claim is based on Seas' false reports to Thurston County and other regulatory organizations. CP 31. These false reports did not relate to any existing government proceeding (subsections (a) and (b)).[5] They were not

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[4] Seas argue that the tortious interference claim is based on Seas' reporting Swanson's contractor to L & I. This is incorrect. To the extent that report may relate to this claim, it is incidental. The claim stands without it. Collateral allusions to protected activity do not subject the claim to the anti-SLAPP statute. *Dillon*, 179 Wn. App. at 72.

[5] Seas argue that subsections (a), (b), and (c) are not restricted to existing proceedings. However, the plain language of these subsections demands such an interpretation. The cases Seas cite for their position are inapposite because they all relate to petitioning activity, which falls under subsection (e).

made in an effort to enlist public participation to initiate or influence any government proceeding (subsection (c)). They were not statements made in a public forum or regarding an issue of public concern (subsection (d)). However, it can hardly be argued that the false reports were not an act of petition, requiring a closer look under subsection (e). To the extent the harassment counterclaim also includes these false reports, the same analysis would apply.

Subsection (e) requires that the conduct at issue be in furtherance of **"the constitutional right of petition."** RCW 4.24.525(2)(e) (emphasis added). Because the anti-SLAPP statutes were enacted to prevent the chilling effect of SLAPP suits on "the **valid** exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," Laws of 2010, ch. 118 § 1 (emphasis added), the courts look to First Amendment cases to determine the reach of subsection (e), *City of Seattle v. Egan*, 179 Wn. App. 333, 338-39, 317 P.3d 568 (2014).

Seas' constitutional right to petition does not include a right to abuse the petition process by making false claims for the purpose of inflicting harm on Swanson.

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Gertz v. Robert Welch, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (citations omitted).

The Washington Constitution specifically excludes false statements from its protection of free speech: "Every person may freely speak, write and publish on all subjects, **being responsible for the abuse of that right."** Const. art. I, § 5 (emphasis added). The phrase imposing responsibility for abuse was inserted to preserve liability for false statements of fact. *See Johnson*, at 46-47 (Siddoway, C.J., concurring) (citing authorities).

Additionally, the anti-SLAPP statutes cannot apply where the targeted activity "is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." *Gerbosi v. Gaims, Weil, W. & Epstein, LLP*, 193 Cal. App. 4th 435, 445, 122 Cal. Rptr. 3d 73 (2011). Making false reports to government is illegal as a matter of law under RCW 9A.76.175:

> A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Nothing in the anti-SLAPP statute or the legislative findings indicates a legislative intent to make substantive changes to the laws affording a plaintiff redress for false statements. *Johnson*, at 25 (Siddoway, C.J., concurring); *see also Dillon*, 179 Wn. App. at 85-86 (holding the anti-SLAPP statute does not operate to negate the privacy act). "The anti-SLAPP statute does not operate to transform unprotected activity into protected activity."

Dillon, 179 Wn. App. at 50. "[T]he legislature did not grant a party immunity from liability for the consequences of speech that is otherwise unlawful or unprotected." *Alaska Structures*, 180 Wn. App. at 598. Thus, an act that is not protected under the First Amendment is not an "action involving public participation and petition" under RCW 4.24.525(4)(a). *Dillon*, 179 Wn. App. at at 85.

The evidence in the record, and reasonable inferences therefrom, viewed in a light most favorable to Swanson, demonstrate that Seas' reports were false and that Seas knew or should have known they were false. No grading occurred on the Swanson property in 2007. CP 164, 293. Swanson did not violate the "conservation easement." CP 254. Swanson's landscaping did not cause excess runoff onto Seas' property (reasonable inference from evidence the fence failure was due to natural aging decay, not excess runoff). CP 164, 294. Seas knew the true condition of Swanson's property in 2007. CP 245, 256-57. The County could not substantiate Seas' claims and ultimately dismissed the action against Swanson. CP 294-95. Seas' false reports to government were illegal as a matter of law and therefore not protected under the constitutional right of petition.

This result is consistent with the legislative intent of the anti-SLAPP statutes. The purpose of the statutes is to prevent the chilling of **constitutionally protected** speech and petition. If liability for false statements "discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate

and does not abridge" freedom of speech or petition. *Herbert v. Lando*, 441 U.S. 153, 171-72, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

5.3.3 The evidence in the record demonstrates a probability of prevailing on the merits of claims arising from the Seas' false statements.

Even if this Court finds that Swanson's counterclaim for false reports is an "action involving public participation and petition," the evidence in the record demonstrates a likelihood of success on the merits.

Swanson's counterclaim is stated in terms of both "false reports" and "abuse of process." CP 31. Swanson alleged that the Seas maliciously instigated her prosecution by the County by filing false reports, which caused Swanson to incur investigation and defense costs on charges that lacked merit and were dismissed. CP 31.

Seas argued that these allegations fail to state a claim for abuse of process because that tort applies only to judicial process, not administrative process. CP 51. The trial court agreed and dismissed the claim under CR 12(b)(6)/CR 56. RP at 34.[6]

However, these factual allegations, as well as other evidence in the record, **do** support a claim for malicious prosecution. Malicious prosecution and abuse of process are often confused for one another, but their elements

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[6] Seas argue that Swanson cannot challenge the trial court's CR 12(b)(6)/CR 56 conclusion because Swanson did not appeal. Appellants' Opening Brief at 21. However, as shown in Part 5.1, above, the decision was interlocutory, therefore Swanson could not appeal by right. *See* RAP 2.2. The decision remains open to revision by the trial court. *See* CR 54(b). Contrary to Seas' arguments, this Court is not restricted in its *de novo* consideration of probability of success on the merits.

are different. *See Fite v. Lee*, 11 Wn. App. 21, 27, 521 P.2d 964 (1974). On remand to the trial court, Swanson will have the opportunity to move to amend her complaint to conform to the evidence and clarify that her claim arising from Seas' false reports to government is one for malicious prosecution. The evidence already in the record is sufficient to demonstrate a likelihood of prevailing on this claim. Thus, even if Seas' false statements to government are somehow within the ambit of the anti-SLAPP statutes, the trial court was correct to deny the special motion to strike.

An action for malicious prosecution has the following elements: (1) that the prosecution was instituted or continued by the defendant; (2) with malice; (3) without probable cause; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942). Malice can be inferred from lack of probable cause. *Id.* at 498. A prima facie case of lack of probable cause is established by proof that the proceedings were dismissed. *Id.* An informant, such as Seas, can be liable for malicious prosecution if he or she "lies or otherwise warps the truth in bad faith" in his or her report to a government decision-maker. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 697, 82 P.3d 1199 (2004).

Seas instituted the prosecution by the County through their false report. The content and context of the report demonstrate Seas' malice. There was no probable cause because the prosecution was based on the Seas' false statements. The fact that the County dismissed the case satisfies element

4 and bolsters the conclusion that there was no probable cause. Swanson has incurred investigation and defense costs as a result.

Because Swanson can support a claim for malicious prosecution, she has demonstrated a likelihood of prevailing on the merits of her counterclaim arising from Seas' false reports to government. Because Swanson would be entitled, on remand, to amend her counterclaims to clarify this claim, and because this Court can affirm on any alternate grounds, this Court should affirm the trial court's denial of the anti-SLAPP special motion to strike.

5.3.4 RCW 4.24.510 does not immunize Seas because their false statements are not constitutionally protected speech or petitioning activity.

As noted above, RCW 4.24.510 only enters into the analysis, if at all, in the second prong: whether Swanson has a probability of prevailing on the merits. Seas argue that they are immune under RCW 4.24.510 from any claims relating to communication to government. However, the immunity provided by RCW 4.24.510 cannot extend to speech and petitioning activity that is not constitutionally protected.

Reports to government based on knowing or intentional falsehood by definition does not involve a bona fide grievance and therefore does not come within the first amendment right to petition. *See Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 743, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). "Just as false statements are not immunized by the First Amendment right to

freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." *Id.*

As demonstrated in Part 5.3.2, above, there is no constitutionally protected right to petition the government through false reports. Indeed, extending immunity under RCW 4.24.510 to false reports would violate **Swanson's** constitutional right to redress. *See Johnson*, at 46-47 (Siddoway, C.J., concurring) (citing authorities) (noting the Washington Constitution's phrase imposing responsibility for abuse of free speech was inserted to preserve liability for false statements of fact).

Seas argue that the statute provides absolute immunity, even where the statements were not made in good faith. However, they are unable to cite any case that extends this immunity to false reports. Reporting true facts for a malicious purpose would be bad faith, but would still be protected. Similarly, reporting incorrect facts without knowledge of falsity might not be good faith, but would still be protected. However, knowing false reports, which are not constitutionally protected, cannot rationally be protected under RCW 4.24.510, particularly where the Washington Constitution protects a plaintiff's right to seek redress for false statements of fact.

5.4 This Court should deny the Seas' request for expenses and attorney fees on appeal.

If this Court affirms, Seas will not be entitled to any expenses or fees under the anti-SLAPP statutes because they did not prevail.

However, even if this Court finds Seas should have prevailed and reverses the trial court's anti-SLAPP decision, this Court should not award

expenses and fees on appeal. This Court has awarded expenses and fees under the anti-SLAPP statute where the moving party prevailed both in the trial court and on appeal, but there is no precedent for awarding anti-SLAPP fees to a moving party that **lost** in the trial court.

The expenses and fees awarded under the anti-SLAPP statute are in the nature of a penalty for bringing a clearly frivolous and abusive SLAPP suit to chill the opposing party's constitutional rights, "to deter repetition of the conduct and comparable conduct by others similarly situated." RCW 4.24.525(6). By prevailing at the trial court, Swanson has demonstrated that her counterclaims were not clearly frivolous or abusive. Additionally, Swanson is not at fault for Seas' decision to appeal or for any error committed by the trial court. Swanson should not be penalized just because this Court determines that the trial court erred.

6. Conclusion

This case is not what the legislature envisioned when it enacted the anti-SLAPP statutes. Swanson's counterclaims do not target constitutionally protected speech or petition. The trial court was correct in determining that the anti-SLAPP statutes do not apply. This Court should affirm.

Respectfully submitted this 8th day of April, 2015.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on April 8, 2015 I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402	____ U.S. Mail, Postage Prepaid ____ Legal Messenger _____ Overnight Mail _____ Facsimile __XX__ Electronic Mail
Bruce H. Johnson Ambika K. Doran Davis Wright Tremaine, LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101-3045 brucejohnson@dwt.com ambikadoran@dwt.com lesleysmith@dwt.com	____ U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile __XX__ Electronic Mail
Judith A. Endejan Garvey Schubert Barer 1191 Second Avenue, 18th Floor Seattle, WA 98101-2939 jendejan@gsblaw.com	_____ U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile __XX__ Electronic Mail
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DATED this 8th day of April, 2015.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant

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April 08, 2015 - 4:58 PM

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